A fourth department styled, the Department of Labor or any other appellation, is abhorrent to the Constitution, unless and until it is amended to encompass a fourth department.

The Commissioner of Labor, or any other fourth department head is abhorrent to the Constitution.

Until the Constitution is amended or in lieu thereof our system of mathematics, which has endured for centuries, is so revolutionized as to treat as a true equation,

3—4

the General Assembly is powerless to enact a law creating a fourth department of the State.

The effect of the judgment of the Supreme court herein is to approve of the above mentioned false equation. Said judgment is erroneous in so doing and we respectfully submit that it should be reversed.

"Those which are executive to another" cannot without doing violence to reason and at the same time maltreating the English language, be said to admit of the executive powers of government being vested in two departments—one the creature of the Constitution and the other the result of legislative action. Inasmuch as the Constitution, which is the supreme law to which all legislative action is subordinate, itself divides the powers of government into three distinct departments, naming each of the three, and then names the officers who shall exercise the powers of each of said departments, *all of the powers of government* are employed and vested in those so named. It follows that there are no powers left for the Legislature to vest in a second other executive department, even if the Lgislature were permitted to create a department of government known as the Labor Department instead of being prohibited from so doing. Two executive departments are abhorrent to the Constitution. "Another" is clearly a singular noun and does not admit of two executive departments.

In *Staney v. Gates*, 179 Ark., at page 897, the court says:

> "The Constitution defines the duties of each department of government." * * *

It is as clear as the light of day that the Constitution does not define the duties of a Department of Labor. Had there been such a department the Constitution would have defined its duties as it did those of the three departments actually existing. The unescapable inference is that it was not intended that a Department of Labor should exist.

Again at page 898 the court says:

"The three departments of government are of equal dignity and no one of them can encroach upon the other." We here have a clear statement by the Arkansas court itself that the constitution limits the departments of government to three.

Since the rendition of the above mentioned opinion, Article IV of our Constitution, which created those three departments and defined the duties of each of them has not been amended. It results that today we have three departments of government and only three, all of which are created by said Article IV—the Legislature, a child of the Constitution to the contrary notwithstanding.

Not infrequently some executive, some legislative body or some court becomes imbued with the idea that some constitutional provision is old fashioned and should be done away with, without the delay required to bring about a constitutional amendment. The fundamental basis upon which American government is predicated is tossed aside and an attempt is made to abandon the idea of a government for, by, and of, the people, resulting in effect in an attempted judicial or legislative amendment of the Constitutino, a shining example of which is the legislative attempt to create a fourth department called the Department of Labor.

Let us either abide by the Constitution, or amend it if a change is desired.

We are not unmindful of what the Arkansas Supreme Court has said in *Buckstaff Bathhouse Co. v. McKinley*, 198 Ark. 91, and *McKinley v R. L. Payne & Sons*, 200 Ark. 1114. Speaking now of the first mentioned case.

The bathhouse in question was erected on a reservation of the federal government and it was contended for that reason the State of Arkansas was without authority to collect the unemployment tax in question, notwithstanding that the consent of the United States was given the State to tax, as personal property, all structures and other personal property in private ownership within the reservation.

The bathhouse company also contended that it was an instrumentality of the United States government engaged in the distribution and conservation of medicinal waters of their reservation.

At page 94 the opinion reads:

"It is further urged that collection of the tax or contribution would be violative of Article IV, paragraph 3 of the Constitution of the United States."

At page 96 the opinion reads:

"The three questions for determination are:

"(1) Did the federal government authorize the State to assess and collect taxes of the character herein discussed?

"(2) Is appellant a government instrumentality or agency and therefore excused?

"(3) Are appellants' employees independent contractors?"

At page 99 the opinion reads:

"Although constitutionality of the Arkansas statute is not directly questioned in the appeal before us, this is the first case reaching this court in which payment of the tax is involved. Necessarily, if we hold that appellant must pay the State's demand, we have upheld the validity of Act 155. For this reason the decisions quoted have been cited."

The court at page 98 quotes from the Carmichael case and from the Davis case, but there is nothing in the language quoted that in the slightest degree militates against the principle points which we here present. This court evidently had no thought of and made no mention of the Act creating the *Department* of Labor onto which Act 155 is by Section 10 of said Act grafted and made a part so that it has no independent existence apart from the Labor Act.

The opinion in the Buckstaff case makes no mention of Articles IV, V, VI and VII or Sections 5 and 6 of Article XVI of the State Constitution or the XIV Amendment to the Federal Constitution, or any of them or any part of any of them.

There was no necessity for the court to make any mention in the Buckstaff case of the State Constitution or any portion of the Federal Constitution other than Section 3 of Article IV of the Federal Constitution.

It is perhaps unfortunate that said court at page 99 did not limit what is said to Section 3 of Article IV of the Federal Constitution when the opinion speaks about upholding the validity of the Act.

Certainly said court did not intend to decide or adjudicate upon any other constitutional question, because none was raised or argued. What said court evidently did and intended to do or at least should have done was to indulge in the well-established presumption that all legislative acts are constitutional until the contrary is made to clearly appear.

We submit that there not only was not but could not be any decision or adjudication, in a legal sense, upon any constitutional question other than pertained to Section 3 of Article IV of the Federal Constitution.

Even if it had been otherwise, as we shall presently see, there is still no reason why such decision should continue to prevail, if, as we think we have abundantly demonstrated in the opening pages of this brief such decision would clearly have been erroneous.

The court did not pretend to pass upon the constitutionality of the Act in question or any portion of it from the viewpoint of any Federal or State particular provision. Clearly the court did not even have in mind Articles IV, V, VI and VII or any or either of them. Apparently the court cimply made a passing remark calculated to dispense with thee discussion or decision of any particular question or questions, especially in view of the fact that the parties had not briefed any constitutional question and it would be a rank injustice to dispose of a litigant's constitutional rights without giving him a full opportunity to be heard. It is perhaps unfortunate that the court did not simply say that every statute is presumed to be constitutional until the contrary is clearly established and we therefore indulge in that preusmption without saying anything of a constitutional nature, because that is in reality what the court concsiously or unconsicously did.

Clearly the law is that all statutes are presumed to be constitutional until the contrary is made to appear.

Grear v. Merchants, 114 Ark. 212.
State v. Moore, 76 Ark. 197.
Stillwell v. Jackson, 77 Ark. 250.
State v. Hodges, 114 Ark. 155.
Adams v. Spellyard, 178 Ark. 614.
Botony v. U. S., 278 U. S. 282.

At most, however, what is said by the court in *Buckstaff v. McKinley* is purely *obiter dictum.*

Rush v. French, 1 Ariz. 99.
In re *Woodruff,* 96 Fed. 317, 321.
State v. Clark, 3 Nev. 566, 572.
State v. Brown, 181 La. 704.
Chandler v. Roes, 80 F: (2d) 407:
San Pedro v Los Angeles, etc., 179 Pac: 390.
Buyers v. Comer, 50 Ariz. 8.
Lynch v. Hill, 2 Atl. (2nd) 614.
House, etc., v. Industrial, etc., 6 A. L. R. 540
In re *Murphy's Estate,* 99 Mont. 114.
Brekke v. Crew, 43 S. D. 406.
Commercial v. Christy, 294 Fed. 212.
Sidney v. Commissioners, 188 N. C. 30.

In *McKinley v. R. L. Payne & Son,* 200 Ark. 1114, at page 1121, the court says:

"This question has been decided many times by this court, but the constitutionality of this particular Act was definitely settled by the case of *Buckstaff Bathhouse Co. v. McKinley, Comrs, supra.*" (198 Ark. 91)

It is thus to be observed that without giving to the constitutional questions raised in 200 Arkansas 1114 any primary or specific consideration they are overruled on the strength of the obiter dictum found in 198 Arkansas 91.

In McKinley v. Payne, 200 Ark. 1114, the appellant raised no question based on the State Constitution. All questions raised were based on the V and XIV amendments to the Federal Constitution.

So far as the Federal questions are concerned they were not raised or argued in the Buckstaff case in 198 Ark., and in the Payne case in 200 Ark. they were disposed of on the strength of the *obiter dictum* contained in the Buckstaff case and we submit should receive a full hearing in this case, for the first time.

Petitioners here ask and only ask the best judgment of this court upon the merits of the questions presented by this brief. Surely this court will not deny to them that consideration because of anything said in either of the Arkansas opinions last above referred to.

What we intended to be an exhaustive search has failed to reveal to our attention any case where there was presented for the consideration of this court the constitutional question of the

validity of either the Labor Act or the Employment Security Act predicated upon Articles IV, V, VI, VII or Sections 5 and 6 of Article XVI of the State Constitution. We therefore say unhesitatingly that those questions are presented to this court for the first time.

In view of this situation we submit that it is impossible for any prior decision of the Arkansas court to be *stare decisis* because there is no decision of said court upon any of said questions.

THE MATTERS INVOLVED IN PARAGRAPHS 26, 27, AND 28 OF THE PETITION

The Court may recall that the allegations referred to in the above captions pertain to the arbitrary and evasive nature of the opinion of the Arkansas Supreme Court To save repetition we again invite the attention of the Court to the details of said allegation as found in the foregoing petition, at pages 10 to 13 inclusive.

In this connection the court will also note that on the subject of the right of the legislature to create the Department of Labor by Act 161 of 1937 the State Supreme Court is discretely silent. The nearest approach to the subject is found in the opinion (R23) where, after basing the passage of the act on the police power the court says, "Having this power the General Assembly has the right to create such offices and agencies as are necessary to its exercise."

This language standing alone, as it does is, in view of the Constitutional issues here involved is very confusing and meaningless. The statement is quite incomplete unless it is limited to agencies and offices, not prohibited by the Constitution. If limited to such as are not prohibited by the constitution it is true. If it is read without limitation it is false.

A stranger to the case would naturally read the courts language to mean that any office or agency might be created by the General Assembly which it might elect, in which case the statement is not correct.

The big question for decision in this case is: In view of Articles IV, V, VI and VII of the Constitution can the General Assembly create a Department of Labor. The language above quoted on its face answers the question, "Yes". The constitution answers it, "No."

We submit that the opinion is so clearly arbitrary and

evasive as to require little or no argument upon that subject and we therefore address our discussion to the consequences that ensue when an opinion is found to be clearly arbitrary and evasive as this court has heretofore stated such consequences. This Court has repeatedly held that there is no case of evasion of constitutional questions you do accept as final the ruling of the State Court on all matters of State law as held for instance in Fox River vs Railroad Commission 264 US 651. But in the opinion of the Arkansas Supreme Court involved in this proceeding we have no ruling or Judicial determination but conversely only statements that are evasive and arbitrary expresions that do not amount to a judicial determination and do not constitute due process of law from the viewpoint of the 14th amendment to the Federal Constitution. In these instances this Court in Ward vs Love 253 US 17 page 22 said:

"Whether the right was denied or not given due consideration by the Supreme Court is a question as to which the Claimants were entitled to envoke our judgment and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect as by putting forward non-federal grounds of decision that were witthout any fair or substantial support." The opinion then cites in support of what this Court said as above quoted.

Union, etc. vs Public, etc., 248 US 67, Leather, etc. vs Thomas etc., 207 US 93. Vandalia, etc. vs Southbend 207 US 359, 67. Garr vs Shannon 223 US 468. Crestwell vs Knights, etc., 225 US 246, 16. Enterprise, etc., v sFarms, etc., 243 US 157, 64. Jefferson vs Skelly 1 Black 436, 43. Huntington vs Atrill 146 US 657-83, 4. Boyd vs Thayer 143 US 135,180. Carter vs Texas, etc., 127 US 442, 47. The opinion then continues. "Of course as non federal grounds plainly untenable, may be thus put forward successfully, our power to review may easily be avoided. Terra Haute vs Indiana 194 US 579, 89." In the case from which we have just quoted the State Court held that the taxes in question had been paid voluntarily this Court held that the circumstances under which the taxes were paid amounted to coercion.

In the case here presented Your Honors will have well noticed that the State Constitutional Provisions embodied in Aricles IV, V, VI, VII of the State Constitution are to plain admit of any honest difference of opinion. By Article IV plainly

all of the powers of State Government are divided into and limited to three departments of Government the Legislative, Executive and Judicial and the Constitution then proceeds to carry into effect the provisions of Article IV by placing the powers to be exercised by each of the three named departments in certain officers therein named in each instance, except in the case of the Judicial Department where the Constitution gives to the Legislature express authority to create Courts in addition to those named in the Constitution and the Arkansas Supreme Court recognizes such situations and expressly states in early opinions the effect of these Constitutional Provisions. As the State Court said in State vs Martin 60 Arkansas 343-50 the idea of two Governor's, Secretary's of State, Treasurers, etc. is unknown in the history of the formation of State Governments in this Republic. Article VI creates the office of Chief Executive and gives him the title of Governor. And by Section 7 Article VI he is charged with the faithful execution of all State laws. In the face of this situation the Legislature sees said to attempt to create another executive department called the Department of Labor and places the head and of each Chief Executive a Commissioner. The Legislature then takes away from the Governor some of the powers given to him to execute all laws and gives those powers to Commissioner of Labor who is by Legislative Act given ful power to enforce all laws pertaining to labor a power which in the absence of a *valid* statute is vested into Governor, by the constitution.

Again the Arkansas Supreme Court reads Article IV, V, VI, VII, of the Constitution as we respectively submit they should be read and in the case of Stanley vs Gates 170 Arkansas 897 Page 897 says, "The Constitution defines the duties of each department of Government." And then proceeds to emphasize that in Arkansas there are but three departments of government and in so doing at page 898 says: "The three departments of government are of equal dignity and none of them can encroach upon the other.'

Although these two cases that are above referred to were cited in our brief in the State Court the opinion takes no note of them. This Court again spoke upon the subject of its duty under circumstances here presented and in Lawrence vs State 276 US 281 Page 281 says, "But the Constitution which guarantees rights and imminuties to the citizen, likewise insures him the privilege of having those rights and imminuties judicially

declared and protected when such judicial action is properly envoked. Even though the claimed Constitutional protection be denied on non-federal grounds it is the province of this Court to inquire whether the decision of the State Court rests upon a fair and substantial basis. If unsubstantial, Constitutional obligations may not be thus avoided."

We respectfully submit that rarely, if ever, has a case been presented to this court calling so loudly for your judicial intervention in furtherance of Justice and the maintainance of constitutional rights, of a multitude of Arkansas taxpayers.

THE SO-CALLED ARKANSAS EMPLOYMENT SECURITY LAW IS UNCONSTITUTIONAL, UNCERTAIN, INDEFINITE, INCOMPLETE AND VOID

No doubt if the Labor Department Act is void, counsel will concede that the Arkansas Employment Security Law is also void, particularly in view of the fact that Section 10 of the Employment Act reads, "There is hereby created *in the Department of Labor* a division to be known as the Employment Security Division," etc.

The Legislature attempted to pass the so-called, "The Arkansas Employment Security Law," Section 10 of which reads in part:

"There is hereby created in the Department of Labor a division to be known as the Employment Security Division which shall be administered by a full time salaried Director who shall be subject to the supervision and direction of the Commissioner. The Commissioner shall appoint, fix the compensation of, and prescribe the duties of the director of the Employment Security Division, provided that such appointment shall be made in accordance with the provisions of Section 11 (d) in this Act."

It is thus made abundantly plain that the only existence of the Division is as a part and parcel of the Labor Department. The Division is a branch grafted on to the Labor Department trunk and has no existence separate and apart from the trunk—but as we have already seen there is no trunk (Labor Department). It follows that there can be no branch or Division and the Employment Security Division falls along with the Labor Department Act.

But the foregoing is only one of the insurmountable obstacles encountered by the would-be Unemployment Security Act. The Commissioner of Labor is made such an indispensable

factor in said Act, that with the Commissioner eliminated, if there were one, which there is not, nothing whatsoever could be accomplished by the emasculatd skeleton remaining.

What we have under the last caption herein stated will, we submit be abundantly verified by allegations contained in the foregoing petition (pages 5 to 9) as to the activities which Act 391 calls upon and authorizes the Commissioner to perform.

If the court will read the fragments of the alleged Act remaining after eliminating therefrom the portions thereof with the "Commissioner" inseparably connected therewith you will readily note that there is not enough remaining to constitute even a remote approach to a workable law. It follows that these remaining fragments, even if severable from the alleged Labor Department Act, which they are not, because by unequivocal language grafted on to that Act and made a part and parcel of it, are a nullity.

It follows that this fragmentary alleged Act is unconstitutional. It is void because it is incomplete, indefinite, and uncertain, and does not constitute due process of law in violation of the XIV Amendment to the Federal Constitution.

Mahew v. Nelson, 346 Ill. 381.
Cline v. Frink, 274 U. S. 445.

SECTION 2 (6) AND EACH AND EVERY PART THEREOF IS IN VIOLATION OF SECTIONS 5 AND 6 OF ARTICLE XVI THEREBY RENDERING THE ENTIRE ACT VOID

The above mentioned section provides in part and in substance.

The term employment shall not include—

(A) Domestic service in a private home.

(B) Services performed on a farm.

(D) Services performed by an individual by his son, daughter, or spouse or by a child under the age of 21.

(H) Services performed by one in the employ of an organization exempt from the payment of income tax, under certain conditions.

(H) (2) Such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office,

or is ritualistic service in connection with any such society, order or assocation.

(L) Services performed in the employ of Chambers of Commerce, base-ball clus and civic organizations and labor unions, except those liable for tax under the Federal Unemployment Tax Act.

(M) Services performed by a student nurse or interne.

(N) Services by one delivering newspapers where the compensation is the difference between wholesale and retail prices.

(O) Services by one now or hereafter exempt under federal law.

(P) Services performed by an insurance agent working on commission.

Section 6 of Article XVI provides:

"*All laws* exempting property from taxation other than as provided in this Constitution *shall be void.*"

It is to be noted that a violation of the last mention provision of the Constitution renders that entire law void and any saving clause embodied in an Act by the General Assembly cannot rescue the otherwise valid part of such *void law.*

Section 5 of Article XVI exempts the property following:

"Public property used exclusively for public purposes; churches used as such, cemeteries used exclusively as such, school buildings and apparatus; libraries and grounds used exclusively for school purposes, buildings and grounds and materials used exclusively for public charity."

The General Assembly studiously avoided the word exempt or any of its derivatives in the above mentioned section; nevertheless, it is as clear as the light of day, when at noon there is a cloudless sky, that the sole purpose of said section is to exempt from the force of the Act the various persons and services in said section named and described.

In *Tedford v. Vaulx,* 183 Ark. 240, the court at page 242 says:

> "All property in this State is subject to taxation except that specifically exempt from taxation by the Constitution. Section 5, Article XVI of the Constitution."

We submit that the above captioned proposition is estab-

lished beyond controversy by the very terms of the section itself and ask the court to so hold.

We submit that regardless of legislative action, the Constitution creates the exemptions therein specified and to make sure that those exemptions and no others shall prevail; the Constitution renders all acts attempting to create other exemptions void.

SECTION 5 (a) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE XIV AMENDMENT

Section 5 (a) provides that no disqualification for benefits shall be made upon the employer's evidence unless he notifies the Commissioner of such fact, in writing, within three days after the separation of the individual from his employment, but it leaves the employee free to testify, regardless of notice.

We submit that this situation is as pronounced a violation of the equal protection provisions of the XIV Amendment as can be conceived of. It clearly denies to the employer the equal protection of the law.

The employee is more apt to know when he quits than is the employer especially in a plant where the employees are numerous.

It is much easier for one employee to give one notice than it is for one employer to give notice of twenty separations.

SECTION 6 (4) IS IN VIOLATION OF THE XIV AMENDMENT AND IS VOID

Said provision assumes to dispense with both common-law and statutory rules of evidence.

We are sure that opposing counsel will admit the existence of the well-established rule of law, that all existing laws in so far as applicable are written into every contract. This certainly includes the law of evidence in existence at the time.

Certainly both employer and employee desire to know when entering into a contract what the law of evidence is that may control any controversy that may arise during the existence of such contract. It is these rules of evidence that the provision in question provides shall not prevail.

Section 5 (7) provides for a judicial review of a decision of the Board of Review in the Circuit Court of Pulaski County, and further provides that a transcript of the evidence taken before said Board shall be filed in said court. Said sub-section then reads:

"No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board of Review, and the Board may, after hearing such evidence, modify its findings of fact or conclusions and file such additional or modified findings and conclusions, together with a transcript of the additional record, with the court."

It is to be noted that the alleged act does not authorize the court to disregard or direct the Board to disregard any evidence which the Board had received and given weight in flagrant violation of well-established rules of evidence.

We further submit that the said sub-section is a plain attempt on the part of the General Assembly to dictate to the court what evidence it may or may not receive in considering appeals from the Board of Review, in violation of Sections 1 and 2 of Article IV of the State Constitution.

SECTION 6 (d) (1) DOES NOT AFFORD TO THE EMPLOYER THE EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE XIV AMENDMENT TO THE FEDERAL CONSTITUION

Said provision permits the *Commissioner* to dispense with notice of determination, to an employer but requires that it be given to the employee.

Said provision provides that the employer shall not have notice, if he has failed to give notice that he was claimant's employer, prior to the determination, if and as required by regulation of the Commissioner. However, the emplyee is not subjected to any similar treatment. He certainly knows who employs him. He can certainly keep track of one employer better and more readily than an employer can keep track of forty employees, and notice can be given much more readily than forty.

We submit that this provision does not afford the employer the equal protection of the law; that it violates the XIV Amendment to the Federal Constitution and is void.

That it is submitted is a clear violation of the equal protection of the law.

Atchison v. Mathews, 174 U. S. 96.
St. Louis v. Winn, 224 U. S. 354.
M. & St. L. v. Kennedy, 232 U. S. 626

The parties, employer and employee, are identically situ-

ated and we submit under the XIV Amendment should be equally protected.

SECTION 6 (5) IS LACKING IN DUE PROCESS OF LAW AND DENIES TO THE EMPLOYER THE EQUAL PROTECTION OF THE LAW

Section 6 (5) reads in part:

"Subject to appeal proceedings and judicial review as provided in this section, any determination, redetermination or decision as to the rights to benefits, shall be conclusive for all of the purposes of thisAct and shall not be subject to any collateral attack, by any employing unit, irrespective of notice."

There are two noteworthy matters in the language quoted:

1. Any determination shall be conclusive as to the employer only.

2. The determination shall not be subject to collateral attack by any employing unit, irrespective of notice—but is subject to collateral attack by the employee.

We take it that in order to be bound by a determination a person must have notice and a chance to be heard, is a proposition too well-established to require the citation of authorities in this court.

There is one case so squarely in point that we feel we would be quite derelict if we did not call it to the court's attention. In *Turner v. Wade,* 254 U. S. 64, 70, the court said:

> "We are therefore unable to find in the decisions of the Supreme Court of Georgia that that court understood paragraph 7 to provide for the notice and hearing required by due process of law. Therefore looking into the section of the statute for ourselves, we are forced to the conclusion that reading the provisions together, being parts of one and the same Act, they clearly show that the Board of Appeals was not required to give any notice to the taxpayer nor was opportunity given him to be heard as of right before the assessment was finally made against him.
>
> "In the present case the taxpayer objected to an assessment without notice. The case comes within *Central Georgia v. Wright,* 207 U. S. 127. The court held that the statute as construed by the Supreme Court of the State of Georgia does not afford the taxpayer due process of law."

SECTION 8 (b) AND (c) ARE IN VIOLATION OF SECTIONS 1 AND 2 OF ARTICLE IV OF THE STATE CONSTITUION

Under the provisions above mentioned, an employer cannot cease to be such, so far as the alleged Act is concerned, except in accordance with the regulations which the General Assembly, under the Constitution is alone empowered to prescribe but which it attempts to delegate power to the Commissioner to determine by regulations, all in violation of Section 1 of Article IV of the Arkansas Constitution.

These sub-sections provide that an employer may become subject to the Act or may cease to be subject to it with the written approval of the Director and subject to regulations made by the Commissioner.

We submit that it is for the legislature to fix the conditions upon which a man comes under the act. It may be left to the Commissioner to determine whether a man has complied with conditions but not to prescribe the conditions. The act constitutes a delegation of legislative power in violation of Article IV of the state constitution.

Under *Yick Wo v. Hopkins,* 118 U. S. 356, these provisions are unconstitutional and void.

SECTION 11 (a) IS IN VIOLATION OF SECTION 4 OF ARTICLE XVI AND IS VOID

Section 11 (a) provides in part:

"It shall be the duty of the Commissioner to administer this Act; and he shall have power and authority to adopt, amend or rescind such rules and regulations *to employ such persons, make such expenditures,* require such reports, make such investigations and take such other action *as he deems necessary or suitable to that end.* Such rules and regulations shall be effective upon publication, in the manner not inconsistent with the provisions of this Act, which the Commissioner shall prescribe."

Section 4 of Article XVI of the Arkansas Constitution provides:

"The General Assembly shall fix the salaries and fees of all officers in the State, and no greater salary or fee than that fixed by law to any officer, employee, or other person, or at any rate other than par value; and the number and salaries of clerks and employees of the different departments of the State shall be fixed by law."

Section 2 of Article XVI provides:

"The General Assembly shall from time to time provide for the payment of all just and legal debts of the State."

We thus observe that by Section 11 (a) of the alleged Act the alleged Commissioner of Labor is authorized to do what by the Constitution is required to be done by the General Assembly. One or the other must fail.

The Constitution is supreme, and the statute is subordinate to it. The result is that the statute must fall.

We further submit that said proposed procedure is lacking in due process of law and therefore in violation of the XIV Amendment to the Federal Constitution.

We respectfully submit that for the several reasons therein stated the prayer of the petition for certiorari should be granted and that a hearing be had in this court upon the merits of the case.

CHARLES M. HAFT,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

AUBREY HICKENBOTTOM, CLARENCE N. HUDSON, EARL E. BONSTEEL, F. L. COFFMAN AND HERBERT L. GIPSON ..... *Petitioners*
(Appellants Below)

vs. No. 576

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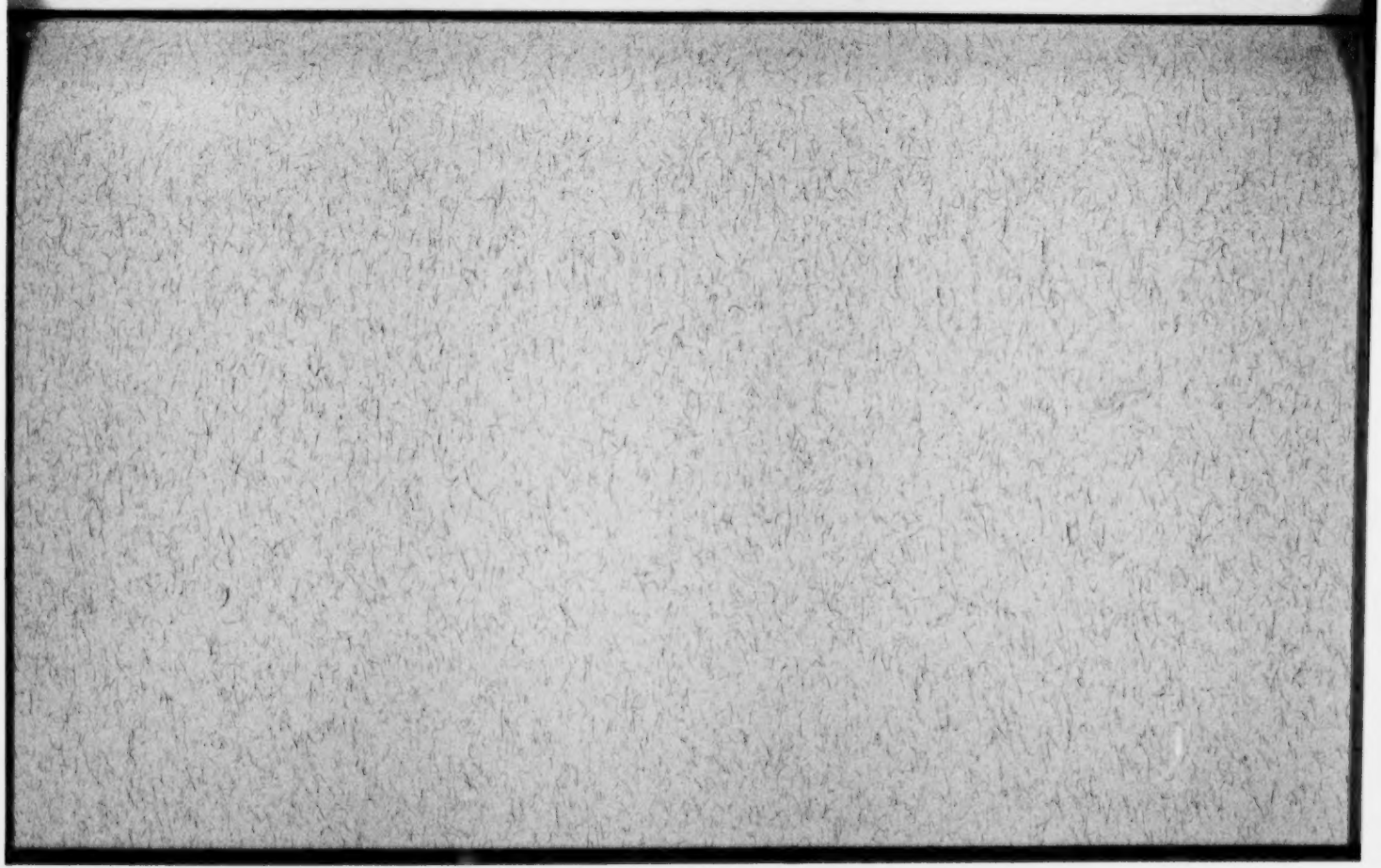
(Appellees Below)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT THEREOF

GUY E. WILLIAMS,
Attorney General for the State of Arkansas.

PARAGON PRINTING CO., LITTLE ROCK



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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

W. J. McCain and Roland M. Shelton, respondents, appellees below, for their response herein state:

First. That the petition for certiorari filed herein should be denied for the reason that the record filed with the petition shows that the judgment in this case was entered on the 19th day of June, 1944, (r. 24), that the petition for rehearing was denied on July 10, 1944, (r. 26), more than

three months having elapsed under the rule used for computation, and this court is without jurisdiction to grant the petition.

Second. The petition filed herein should be denied for the further reason that no substantial federal question is presented.

Third. That said petition should be denied because the question attempted to be presented is unsubstantial and frivolous and cannot be made substantial so as to serve as a basis of the exercise of appellate jurisdiction of the Federal Supreme Court over a State Court.

Fourth. In paragraph two of the complaint, petitioners, who were appellants below, allege that certain acts of the Arkansas Legislature creating the Department of Labor were null and void for the reason that said acts were in violation of Articles IV, V, VI, and VII of the Constitution of the State of Arkansas (r. 1-2). In Section III of their complaint they allege that the Arkansas Employment Security Act violates Section 4 of Article XVI of the Constitution of the State of Arkansas. None of the foregoing allegations present any Federal question, but only present questions of local laws over which this court has no jurisdiction; therefore, the petition insofar as the questions presented in these allegations should be denied.

Fifth. Petitioners following the above allegations in their complaint allege that certain sections of the Arkansas Employment Security Law, which is Act 391 of the General Assembly in Arkansas of 1941, violate the Fifth and Fourteenth Amendments of the Federal Constitution as well as certain provisions of the Constitution of the State of Arkansas. These allegations do not present a substantial Fed-

eral question for the reason that said question raised has been explicitly foreclosed by decisions of this Court in the case of *Carmichael* v. *Southern Coal & Coke Company,* 301 U. S. 495, 81 L. Ed. 1245, and in the case of *Buckstaff Bath House Company* v. *Ed I. McKinley, as Commissioner of the Department of Labor of the State of Arkansas,* 308 U. S. 358, 84 L. Ed. 322. Said petition should, therefore, be denied.

WHEREFORE, respondents pray that the petition for certiorari filed herein by petitioner be denied and for all other proper relief to which they may be entitled.

GUY E. WILLIAMS,

Attorney General for the State of Arkansas.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

AUBREY HICKENBOTTOM, CLARENCE N. HUDSON, EARL E. BONSTEEL, F. L. COFFMAN AND HERBERT L. GIPSON ..... *Petitioners*
(*Appellants Below*)

vs. No. 576

W. J. McCAIN, ROLAND M. SHELTON, ROSS RICHESIN, *Sheriff of Boone County, Arkansas;* EULAN MOORE, *Clerk of the Circuit Court of Boone County, Arkansas, and* HUGH BURLISON ..... *Respondents*
(*Appellees Below*)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF IN SUPPORT OF THE FOREGOING RESPONSE

PART I

The first allegations in petitioner's complaint and in their petition filed herein are made with respect to the constitutionality of the Labor Board Act, being Act 161 of the General Assembly of the State of Arkansas for the year of 1937. They complain that the Supreme Court of Arkan-